

International Organizations

O.E.C.D. Resolution on the Protection of Foreign Property

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At a meeting of the Council of the Organization for Economic Cooperation and Development (O.E.C.D.) on October 12, 1967, a Resolution was adopted reaffirming the adherence of Member States to the international law principles embodied in the O.E.C.D. Draft Convention on the Protection of Foreign Property, commending the Draft Convention as a basis for further extending and rendering more effective the application of these principles, and approving publication of the Draft Convention. It is made clear in this Resolution that the Draft Convention includes the Notes and Comments constituting its interpretation. The text of the Resolution is set out in Annex A to this Report. The Draft Convention itself, together with the Notes and Comments, are set out in Annex B.

An earlier version of the Draft Convention was published by the O.E.C.D. in December 1962.¹ The Council then authorized that it be made available to governments of non-Member States and "other interested circles" in order to obtain comments on it. It was then stated that the Council had not taken a decision on its principles and content and that it did not carry the Organization's endorsement. The action now taken on October 12, 1967, does constitute a decision on the principles and content of the Draft in its present form.

In January 1963, the A.B.A. International and Comparative Law Section's Committee on International Trade and Investment analyzed and commented upon the provisions of the Draft published in 1962.² Subsequently, the United States Government proposed cer-

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¹ Draft Convention on the Protection of Foreign Property, Text with Notes and Comments, O.E.C.D. Publication No. 15,637 (December 1962).

² "The Protection of Private Property Invested Abroad," A Report by the Committee on International Trade and Investment, Section of International and Comparative Law, American Bar Association, at 59 to 113. For the Resolution adopted by the House of Delegates of the American Bar Associa-

tain changes in the text, and in the Notes and Comments, as these had been formulated without its participation. After intergovernmental discussions a modified text emerged.³ It is this later text whose publication has now been authorized.

Although it is perhaps disappointing that the Draft is not now in the process of becoming a legally binding instrument among a significant group of States, both within and outside the O.E.C.D., and both developing as well as developed nations, the importance of the step that has been taken is indeed great. For the first time, an international organization, composed of twenty-one States stretching across the northern half of the globe from Japan in the east to Canada and the United States in the west, has declared its adherence to the basic principles of international law that govern the protection of foreign private property.⁴ These principles include (1) the fair and equitable treatment of property; (2) its protection and security; (3) non-

tion on August 13, 1963, approving the principles of the Draft Convention, see 49 *American Bar Association Journal* 988 (Oct. 1963).

³ See Annex B. No changes have been made in the texts of Articles 1 and 2. In Article 3, the words in (ii) reading "or contrary to any undertaking which the former Party may have given" have been deleted, but a revised Note to Article 3 headed "Relation to Article 2" states "Nothing in Article 3 relieves a Party which has given an undertaking in relation to property from the obligation imposed by Article 2." The Notes to Article 2 also include the statements that the principle of *pacta sunt servanda* referred to in Note 1(a) "is undoubtedly the basic norm of any system of law relating to agreements between States and foreign nationals." The first part of Note 1(b) reads: "If a Party should fail to observe an undertaking given in relation to property on the ground that the undertaking was contrary to its constitutional laws, it will be obliged to provide just compensation where required under this Convention. In giving an undertaking to a national of another Party relating to his investment or concession, a Party acts in the exercise of its sovereignty. . . ." Article 5 has been amended by deleting former paragraph (b) so that the Article now reads simply "Any breach of this Convention shall entail the obligation of the Party responsible therefor to make full reparation." In Note 1 to this Article, the following statement has been added: "Questions concerning recognition by a Party of measures contrary to the provisions of the Convention shall be determined in accordance with such principles of international law as may apply." The Note on "Full Reparation," after quoting from the Chorzow case (PCIJ Series A, No. 17, p. 47) that reparation must wipe out as far as possible all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed, concludes: "In practice, such reparation will generally take the form of damages."

⁴ Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States. The delegates for Spain and Turkey abstained in the vote on the Resolution.

impairment of its management, maintenance, use, enjoyment, or disposal by unreasonable or discriminatory measures; (4) the observance of undertakings relating to private property; and (5) a prohibition of measures directly or indirectly depriving a private party of his property unless such measures are taken in the public interest and under due process of law, are not discriminatory, and are accompanied by provision for the payment of just compensation representing the genuine value of the property affected, paid without undue delay, and transferable to the extent necessary to make it effective for the private party entitled to it. Any breach of the Convention would entail the obligation of the Party responsible therefor to make full reparation.⁵

It is undoubtedly wise to seek adherence by less developed countries outside the O.E.C.D. before the Convention is formally opened for signature. Whether or not a multilateral instrument in its present form is acceptable to such countries, the principles embodied in it, being principles of customary international law widely recognized, continue to be effective. They are recognized not only in the O.E.C.D. decision of October 12, 1967, but also in an impressive network of treaties with many developing countries, in United Nations resolutions and declarations, and in the contemporary practice of States relating to the large and varied private foreign investments currently being made in all countries of the world which accept such investments.

In this brief report there is no need to analyze the principles embodied in the Draft Convention which have now been "reaffirmed" in the O.E.C.D. Resolution, but it is appropriate to emphasize acceptance by the United States of the principle that government contracts with private parties are binding and that this is a principle of international law. This is a significant development, as comparable provisions have not heretofore been included in bilateral treaties to which the United States is a party relating to the protection of American-owned property in other countries.⁶

⁵ See Annex B.

⁶ For a review of bilateral treaties, see Report, *supra* Note 2, at 39 to 58. For provisions in recent German, French, Swiss, Netherlands, and United Kingdom treaties see Appendix II to the Brief for the American Bar Association as *Amicus Curiae* in *Banco Nacional de Cuba v. Farr* and others, U.S. Circ. Ct. of Appeals, 2d Circuit, Civil Action 60-3929-S.D.N.Y. See also "The Compensation Requirement in the Taking of Alien Property," Report of the Committee on International Law, 22 *The Record of the Association of the Bar of the City of New York* 195 (March 1967).

Another important aspect of this decision is the recognition it gives to the carefully prepared notes and comments interpreting the text of the Draft Convention. This material should be of great assistance to tribunals concerned with government takings of alien-owned property and with government contracts with aliens, including arbitral tribunals established under the World Bank Convention on the Settlement of Investment Disputes expressly mentioned in the last preambular paragraph of the Resolution. As appears from the third preambular paragraph, these Notes and Comments are included within the definition of "the Draft Convention." In this way, the clarifications and interpretations contained within them are incorporated in the international law principles which are "reaffirmed" by Member States in the first operative paragraph of the Resolution.

Although these principles of international law will, as noted above, continue to be effective whether or not the Draft Convention is signed and ratified, private concerns investing in developing countries would be all the more encouraged and assured if they are widely incorporated in bilateral or multilateral instruments to which their governments are parties. The Resolution itself declares that "a clear statement of these principles will be a valuable contribution towards the strengthening of international economic co-operation on the basis of international law and mutual confidence." There should be no disparagement of this important observation. Nevertheless, there is still need for "a wider application of these principles in . . . international agreements" if private investments are to be encouraged, as the Resolution's sixth preambular paragraph points out and as the second operative paragraph indicates.

It is hoped that treaties to which the United States is a party, in addition to those already in existence, can be rapidly and extensively developed to give effect to these principles. The O.E.C.D. Draft Convention, which is itself a product of intensive and prolonged discussions among governmental experts from both capital-importing and capital-exporting countries in the O.E.C.D., developing as well as developed, could serve as a suitable vehicle for such an effort. Indeed, it is by now so thoroughly familiar to all governments concerned with promoting the flow of private investments to developing countries that it should prove to be the quickest method of obtaining widespread reaffirmation of the principles involved and of the rules adopted for giving effect to them.